Hastings Law Journal

Volume 46 | Issue 2 Article 7

1-1995

Federal Judicial Impeachment: Defining Process Due

Alexa J. Smith

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the Law Commons

Recommended Citation

Alexa J. Smith, *Federal Judicial Impeachment: Defining Process Due*, 46 Hastings L.J. 639 (1995).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol46/iss2/7

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Federal Judicial Impeachment: Defining Process Due

by
ALEXA J. SMITH*

> The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.[1]
>
> Considerate [people], of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no [person] can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every [person] must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.[2]

Introduction

The impeachment process was instituted to remove "fallen" federal civil officers.[3] Although the Constitution limits removal by impeachment to actions of "Treason, Bribery, or other high Crimes and Misdemeanors,"[4] scholars have noted that impeachment proceedings may be instituted for offenses outside the criminal realm.[5] Such of-

---

* LL.M. Candidate Harvard Law School, 1995; J.D. Hastings College of the Law, 1994; A.B. University of California, Berkeley, 1989. I would like to express my appreciation to Professors C. Keith Wingate and Joseph Grodin for their insightful comments on earlier drafts. Additionally, I would like to thank Professors W. Ray Forrester and Richard Marcus and the *Hastings Law Journal* editors. I would also like to thank my parents, Elthello and Beverly Smith, for their overwhelming support.

1. BENJAMIN CARDOZO, NATURE OF THE JUDICIAL PROCESS 168 (1921).

2. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 1 (1973).

4. U.S. CONST. art. II, § 4. Additional constitutional provisions regarding impeachment are: "The House of Representatives shall have the sole power of impeachment," U.S. CONST. art. 1, § 2; and U.S. CONST. art. 1, § 3, cl. 6, which states:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

5. *See* BERGER, *supra* note 3, at 58 (stating that criminality is not a requirement for impeachment); *see also* CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 87 (1922) (stating that grounds for impeachment may include misconduct in office);

fenses include acts that undermine public confidence in the judiciary or compromise the integrity of the judicial branch.[6] Thus, one aim of impeachment proceedings is to shield the judiciary from any appearance of impropriety.

All federal judges take an oath to uphold the American legal system.[7] A judge who has abdicated the immense responsibility that the position dictates must, by necessity, be disciplined. However, any judge charged with wrongdoing must be entitled to the same benefits of impartiality, justice, and fairness that have been the hallmarks of our legal system. A truly successful legal system consistently operates with fairness and impartiality toward all before it, and the American legal system depends on public trust. When any aspect of such a justice system is fatally flawed in its treatment of one category of accused persons, the rights of all accused are threatened and the public confidence is diminished.

This Note argues that the current impeachment process, as applied to federal judges, violates the due process rights of accused judges.[8] This Note also exposes the flaws in the current impeachment

---

ALEX SIMPSON, JR., A TREATISE ON FEDERAL IMPEACHMENTS (1973) (concluding that the commission of a crime is not necessary to impeach); Arthur Bestor, *Impeachment: The Constitutional Problems*, 49 WASH. L. REV. 255 (1973) (book review) (noting that the Framers of the Constitution intended impeachment to reach political conduct injurious to the commonwealth, whether criminal or not). *But see* IRVING BRANT, IMPEACHMENT: TRIALS & ERRORS 180-81 (1972) (arguing that impeachment should be limited to criminal offenses).

6. See HOUSE COMM. ON THE JUDICIARY, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, 93d Cong., 2d Sess. 21 (1974) [hereinafter CONSTITUTIONAL PRESIDENTIAL IMPEACHMENT], which states

> [T]he House has placed little emphasis on criminal conduct . . . . Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions. Recitals that a judge has brought his court or the judicial system into disrepute are commonplace.

See also PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 99 ("Insofar as impeachment had concerned misconduct and misuse of power rather than common law crimes, the danger of its misapplication was heightened.").

7. 28 U.S.C. § 453 (1993) requires each justice or judge to take the following oath or affirmation before performing the duties of the office:

> I, [state your name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [state your position] according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

8. Although much has been written regarding impeachment, surprisingly little appears in the academic literature regarding the constitutional or prudential issues inherent in the impeachment process. *See generally* PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 148-81 (1987); JAMES D. ST. CLAIR ET AL., AN ANALYSIS OF THE CONSTITUTIONAL STANDARD FOR PRESIDENTIAL IMPEACHMENT (1974) [hereinafter

process, and proposes the adequate process due. Part I considers the framing and ratification of the Constitution's impeachment clauses. Part II discusses the current impeachment process itself, beginning with actions taken pursuant to the Judicial Councils Act[9] and finishing with the Senate impeachment trial. Part III describes the most recent federal judicial impeachments of Judges Harry Claiborne, Alcee Hastings, and Walter Nixon. Part IV analyzes the imprudence inherent in the current impeachment process. Section A of Part IV presents a due process analysis, arguing that the Judicial Councils Act denies the accused procedural due process by failing to guarantee public scrutiny or to provide for resolution of judicial conflicts of interest. Further, Section A explains that recusal as implemented in the impeachment process is an inadequate remedy because recusal is largely discretionary and does not provide a random selection process for the replacement of recused judges. Section B of Part IV argues that the Supreme Court's reliance on the political question doctrine as a basis to decline review of congressional impeachment decisions directly contradicts the reality of the substantial role judges play in impeachment under the Judicial Councils Act. Moreover, Section B of Part IV explains that due process protections are even more important because judicial review of Senate impeachment proceedings is denied. Part V discusses remedies to these problems, presenting procedural safeguards to guarantee the fairness of the process and maintain the appearance of propriety. This Section argues that providing for judicial review of judicial council decisions, opening investigation reports to public scrutiny, and creating a random selection process to address conflicts of interest of adjudicatory judges will ensure that justice is done. Part V also argues that consistency in the application of the political question doctrine to federal judicial impeachment proceedings is necessary to return the spirit of justice to the justice system.

PRESIDENTIAL IMPEACHMENT]; DEPARTMENT OF JUSTICE, LEGAL ASPECTS OF IMPEACHMENT: AN OVERVIEW (1974); Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719 (1970); Ronald D. Rotunda, *Symposium on Judicial Discipline and Impeachment: An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707 (1988); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959); Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330 (1937); Note, *Vagueness in the Constitution: The Impeachment Power*, 25 STAN. L. REV. 908 (1973).

9. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified as amended at 28 U.S.C. §§ 331, 332, 372 (1993)) [hereinafter Judicial Councils Act].

I. The History of the Framing and Ratification of the Impeachment Clauses

To fully explore the impeachment process, it is necessary to understand the purpose of impeachment and the role that the Framers of the Constitution intended impeachment to play in American society. The issue of judicial impeachment was discussed extensively during the Constitutional Convention.[10] The Framers grappled with the competing interests of judicial independence on the one hand and the need for judicial accountability in cases of abuse or incapacity on the other.[11] In deciding who should exercise the substantial power of impeachment, the Framers intended to distribute the power over the several branches of government to prevent the consolidation of power in any one branch.[12] The Framers envisioned impeachment to be a fair process—a process not subject to the whim of any one political faction that might use it to achieve its own political ends.[13] In balancing these interests, the Framers considered a number of proposals, including one proposal to place the impeachment trial function in the judicial branch.[14] This proposal called for trials of impeachment to be held in the national judiciary pursuant to the "Virginia Plan."[15] However, the proposal was subsequently abandoned.

After consideration of several factors, the Framers rejected the Supreme Court as the court to ultimately decide impeachments. The Framers believed that the Supreme Court Justices, like the judges of the lower courts, would not possess the "degree of credit and authority" necessary to persuade the public because they perceived the group to be too small in number to adequately treat impeachment inquisitions.[16] Such a small group, it was thought, would be unable to assure both justice and public tranquility.[17] More importantly, the

10. 2 THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787, at 159, 500, 551 (Max Farrand ed., rev. ed. 1937) [hereinafter Farrand]; NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 49, 61, 319, 539, 577 (Adrienne Koch ed., 1966) [hereinafter MADISON'S NOTES].

11. See THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In contemplating regulation, the Framers recognized that some accountability should be instituted in case life-tenured, unelected judges abused their positions through acts of treason or sheer neglect of office. *Id.*

12. THE FEDERALIST No. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13. MADISON'S NOTES, *supra* note 10, at 606.

14. *Id.* at 605-07.

15. Farrand, *supra* note 10, at 21-22.

16. THE FEDERALIST No. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. Alexander Hamilton expanded on this view in *The Federalist No. 65*:

> The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding .... The awful discretion which a court of

Framers were concerned that the same tribunal not try the accused twice.[18] The Framers recognized that the accused, if convicted of impeachment, might also be subject to criminal charges, and the Framers did not want the same court to try both offenses.[19] In effect, the Framers found that the same tribunal holding the ability to try both offenses would deny the accused an impartial process.[20] Furthermore, the Framers expressed interest in obtaining fairness for the accused. The Framers did not want to subject the accused, through the criminal process, to the judgment of those who may have already determined the accused's guilt in the impeachment inquiry.[21]

The Framers were also concerned that the House of Representatives might abuse the power of impeachment. This was manifested in the Framers' rejection of the traditional English practice of removal by address.[22] That practice made judges subject to the sway of the political winds by allowing for their speedy removal upon the insistence of politicians. The Framers believed this would severely undermine the constitutional structure of the government because it would reduce the power of the court to review acts of Congress.[23]

However, the Framers believed the Senate possessed the ability to remain unswayed by the "passions of the whole community" and to make decisions based on the "real demonstrations of innocence or guilt."[24] Thus, the Framers chose the Senate as "the court for the trial of impeachments."[25] The Senate was considered the most likely to "allow due weight to the arguments" for and against the accused.[26]

---

impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

THE FEDERALIST NO. 65, at 492 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

18. *Id.* at 399.

19. *Id.* ("Would it be proper that the persons, who had disposed of his fame, and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune?"). *See also* MADISON'S NOTES, *supra* note 10, at 577, 605-06.

20. Alexander Hamilton notes in *The Federalist No. 65* that "by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate, would often be virtually included in a sentence . . . ." THE FEDERALIST NO. 65, at 399 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

21. *Id.* ("Who would be willing to stake his life and his estate upon the verdict of a jury, acting under the auspices of judges, who had predetermined his guilt.").

22. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2013, at 334-35 (1907).

23. THE FEDERALIST NO. 78, at 470-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961); MADISON'S NOTES, *supra* note 10, at 337.

24. MADISON'S NOTES, *supra* note 10, at 337.

25. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

26. *Id.* at 397.

Also, the Framers apparently believed that the "power of originating the inquiry . . . ought to be lodged in the hands of one branch of the legislative body."[27]

The independence of the judiciary from the other branches is of utmost importance. In addition to careful selection of the forum to try judicial impeachments, the Framers placed protection of judicial independence in several articles of the Constitution.[28] Article III gives judges life tenure and a promise of undiminished compensation.[29] Article II provides only a limited number of reasons to justify removal of a judge from office by impeachment.[30] Furthermore, the Framers expressly designed the impeachment process to protect judges by requiring a two-thirds super-majority vote to convict.[31] However, in addition to their considerations of fairness to the accused, the Framers also realized that the authority of the judiciary depends both on the courage and integrity of individual judges and on the public perception of the institution as fair, impartial, and efficient.[32]

II. The Impeachment Process

A. The Judicial Councils Reform and the Judicial Conduct and Disability Act of 1980

The structure of the federal court system created by the Constitution focused on judicial independence, making judges autonomous in most actions. Because the sphere of the judiciary was considered sacred, developing regulation of federal judicial action was a slow process. Modern regulation of the federal judiciary is codified in the Judicial Councils Act and is the result of nearly fifty years of consideration by Congress and the federal judiciary of the best means by which to assure responsible judicial conduct, while remaining consistent with the constitutionally protected independence of the judicial branch.[33]

---

27. *Id.*

28. THE FEDERALIST No. 78 (Alexander Hamilton).

29. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

30. "[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4; *see supra* notes 5-6 and accompanying text.

31. U.S. CONST. art. I, § 3, cl. 6.

32. THE FEDERALIST No. 78, at 470-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

33. For a complete history of the purpose of the Judicial Councils Act, see Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982), and Michael J. Remington,

Prior to the Judicial Councils Act, the first grant of authority for judicial self-policing was found in the Administrative Office Act of 1939.[34] The Act stated that a judicial council for each circuit would "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit courts."[35] The Act separated the management of the federal judiciary from the executive branch and specifically authorized the judicial councils to control judicial assignments and set standards for judicial ethics.[36] The revision of the Judicial Code in 1948 further expanded the role of judges in judicial policing. In the 1948 revision, the judicial councils were authorized to issue direct orders and actually discipline fellow judges based on case backlog and physical or mental disability.[37] However, even under the Act, the judicial councils ran their affairs in an ad hoc manner.

In 1970 the Supreme Court, in *Chandler v. Judicial Council of the Tenth Circuit*,[38] expressed concern about the lack of specificity in the scope of the judicial council's powers.[39] In that case, Judge Stephen Chandler, U.S. District Judge for the Western District of Oklahoma, challenged the judicial council's order relieving him of all of his judicial duties.[40] Judge Chandler argued that the council order infringed

Circuit Council Reform: A Boat Hook for Judges and Court Administrators, 1981 B.Y.U. L. REV. 695. The National Commission on Judicial Discipline and Removal, chaired by Robert Kastenmeier, was commissioned to study the problems associated with the Judicial Councils Act. Howard Mintz, *It's Not Over Yet for Aguilar*, THE RECORDER (San Francisco), May 6, 1994, at A1. The report, released in August 1994, endorses the current federal discipline system. *Report of the National Commission on Judicial Discipline and Removal*, 152 F.R.D. 265 (Aug. 1994) [hereinafter *National Commission Report*]. The commission rejected a proposal to rely on a central enforcement authority that is characteristic of state systems because of the perceived interference with judicial independence. *Id.* at 351.

For a collection of working papers prepared for the Commission, see Stephen B. Burbank & S. Jay Plager, *Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1 (1993); Jeffrey N. Barr & Thomas E. Willing, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25 (1993); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209 (1993); Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV 243 (1993); Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333 (1993).

34. Administrative Office Act of 1939, Pub. L. No. 76-299, 53 Stat. 1223, 28 U.S.C. § 332 (1993).

35. *Id.* § 332(d)(1).

36. MARY L. VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE 9-10 (1993).

37. *Id.* at 10.

38. 398 U.S. 74, 86 (1970).

39. *Id.* at 85 n.6.

40. *Id.* at 82.

on his constitutional powers as a judge and encroached on Congress's constitutional impeachment power.[41] However, the Supreme Court refused to decide the question of the constitutionality of the broad powers afforded the judiciary, instead resting its opinion on the insufficiency of Judge Chandler's case.[42]

Against this abstract backdrop, and despite the lack of previously condoned judiciary engagement in lengthy investigations, the Judicial Councils Act of 1980 was born. Congress noted that "[t]he goals of the . . . legislation are to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's system of justice, and, at the same time, to maintain the independence and autonomy of the judicial branch of Government."[43]

To this aim, the Act allows for the formation of a judicial council for each circuit in accordance with the prior system. Additionally, the Judicial Councils Act creates a tribunal parallel to the court system for the adjudication of complaints against judges. The Judicial Councils Act permits any person to file a complaint against a judge for "conduct prejudicial to the effective and expeditious administration of the business of the courts."[44] A copy of the complaint is filed with the appropriate circuit court and is first reviewed by the chief judge of the circuit or by the senior circuit judge if the chief judge is the object of the complaint.[45] A copy of the complaint is also sent to the accused judge.[46] The chief judge must expedite the review of the complaint if the complaint relates directly to the merits of a specific decision or, if "frivolous," the complaint must be immediately dismissed.[47] A complaint will also be dismissed if appropriate corrective action has been taken.[48] However, if the complaint is so complex that the chief judge of a circuit cannot address it easily, the complaint is referred to a special committee of district and circuit judges (the investigating committee) whom the chief judge appoints.[49] The committee of judges conducts an investigation into the complaint, reports its findings, and

41. *Id.*

42. *Id.*

43. H.R. REP. No. 1313, 96th Cong., 2d Sess. 1 (1980); 126 CONG. REC. S13,858 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini).

44. 28 U.S.C. § 372(c)(1) (1993).

45. *Id.* § 372(c)(2).

46. *Id.*

47. *Id.* § 372(c)(3)(A).

48. *Id.* § 372(c)(3)(B).

49. *Id.* § 372(c)(4)(A)-(C). If, after receiving a complaint regarding the conduct of a judge, the Chief Judge does not dismiss that complaint, the Chief Judge "shall promptly appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint." *Id.* § 372(c)(4)(A).

recommends remedial measures to the judicial council of the circuit. The judicial council is then charged with the task of conducting additional investigations, if necessary, and implementing remedial measures such as certifying the judge's disability, directing the judge to retire voluntarily, suspending the judge's calendar, issuing a private or public censure or reprimand, or taking any other action deemed appropriate.[50] Should the judicial council determine that the complaint against the judge rises to a level possibly warranting impeachment, the council must transfer the complaint along with the record of proceedings to the Judicial Conference of the United States.[51] The Judicial Conference is chaired by the Chief Justice of the United States Supreme Court and includes the chief judge of each circuit court.[52] The Judicial Conference is empowered to review the record and institute its own independent investigation.[53] To aid their investigatory functions, both the judicial council and the Judicial Conference are endowed with "full subpoena powers."[54]

The results of the judicial investigations are kept confidential; papers, documents, and records of proceedings may not be disclosed by any person.[55] However, the Judicial Councils Act allows for a judicial council, in its discretion, to release a copy of a report of an investigatory committee to the complainant whose complaint initiated the investigation.[56] Additionally, the various branches involved in the impeachment proceeding may act to release material necessary to further an ongoing impeachment investigation, or documents may be released at the discretion of the judicial council if such disclosure is

50. *Id.* § 372(c)(6).

51. 28 U.S.C. § 372(c)(7)(B) (1993) states:

> In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct—(i) which might constitute one or more grounds for impeachment under Article I of the Constitution; . . . the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

52. The Judicial Conference is formed as follows:

> The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate .... If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee.

28 U.S.C. § 331 (1993).

53. 28 U.S.C. § 372(c)(8)(A) (1993).

54. *Id.* § 372(c)(9)(A)-(B).

55. *Id.* § 373(c)(14).

56. *Id.* § 373(c)(14)(A).

authorized in writing by the accused judge.[57] A judge who is the object of a complaint may appeal decisions of the chief judge of the circuit to the Judicial Conference. However, there is no formal judicial review of decisions rendered in disciplinary investigations.[58]

Should a judicial council determine that the alleged conduct rises to the level requiring impeachment, and the Conference concurs, the Conference must communicate that determination to the House of Representatives.[59] The House may then proceed in whatever manner it deems appropriate.[60]

B. The Congressional Role

Should the House agree with the determination of the Judicial Conference that impeachment of a federal judge is warranted, the House drafts articles of impeachment and votes to determine whether the impeachment proceeding should be initiated.[61] In drafting the articles, the House reviews the record of investigations compiled by the judicial council or the Judicial Conference.[62] Should a majority of the members of the House determine that the accused judge's conduct warrants impeachment, the articles are approved. As becomes evident from the modern impeachment cases, presented in Part III of this Note, the vote generally results in a perfunctory "rubber stamp" of the determination of the Judicial Conference.[63]

---

57. *Id.* § 373(c)(14)(A)-(C).

58. 28 U.S.C. § 372(c)(10) (1993).

59. 28 U.S.C. § 372(c)(8)(A) (1993) states:

> If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

Curiously, section 372(c) of the Judicial Councils Act relating to investigation and impeachment recommendations does not apply to Justices of the United States Supreme Court.

60. *Id.*

61. See CHARLES A. BLACK, JR., IMPEACHMENT: A HANDBOOK 6-9 (1974).

62. *Id.*

63. The congressional delegation of the authority to investigate judicial conduct warranting impeachment to the judicial branch is constitutionally suspect. It has been noted that although the final decision to impeach remains in the House, substantial weight must be given to a recommendation of impeachment from the Chief Justice of the United States Supreme Court and the chief judges of all of the federal circuit courts. Hastings v. Judicial Conference of the United States, 829 F.2d 91, 110 (D.C. Cir. 1987) (Buckley, J., concurring in part and dissenting in part), *cert. denied*, 485 U.S. 1014 (1988). In that case, Judge D.H. Ginsberg, Circuit Judge for the District of Columbia Circuit, speaking for the majority found that the certification from the Judicial Conference to the House of Representatives that impeachment of a judge may be warranted was harmless because Congress might "equally . . . regard a private informant's suggestion that a judge may have committed an impeachable offense as a matter of utmost gravity." *Id.* at 102-03. Judge Buckley dissented

After articles of impeachment have been approved by the House, they are transferred to the Senate, where a committee of Senators conducts a trial of the accused judge.[64] The House of Representatives acts as prosecutor of the accused before the Senate committee.[65] The Senate committee compiles a record of the proceedings and presents that record to the full Senate. The full Senate votes on whether to impeach the judge based on the evidence in the record compiled by

---

from the court's treatment of the question of whether the Judicial Councils Act violates separation of powers. *Id.* at 110. Arguing for a more thorough analysis of the question, Judge Buckley noted that although any private citizen has the authority to submit a complaint against a judge, the judicial councils and the Judicial Conference are the only complainants with the power to support their complaint through investigations, subpoenaed witnesses, and extensive testimony. The judge reasoned that the recommendation of impeachment reflecting the judgment of such an impressive collection of jurists makes it difficult for the House to exercise its role in the impeachment process independently. *Id.*

This is illustrated by the Hastings case. *See supra* Part III.B. The judicial council's hired attorney, John Doar, worked for 6,000 hours investigating Judge Hastings. Jack Bass, *Why the Alcee Hastings Case Is Still Not Settled,* WASH. POST, Jan. 10, 1993, at C4. The council also took testimony from more than 112 witnesses before it recommended impeachment proceedings. *Id.*

It has been argued that judicial participation in the process "exploits the Framers' *blending* of governmental powers" by "allow[ing] the judicial branch to serve as an expert witness for or against one of its members." Elbert P. Tuttle & Dean W. Russell, *Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending" of Powers*, 37 EMORY L.J. 587, 610 (1988). The recommendation by the Judicial Conference is characterized as "testimony," which the House is free to give any weight it wishes. *Id.* However, this view ignores the prosecutorial nature of an impeachment investigation and the explicit intent of the Framers that the legislature should initiate impeachments. Alexander Hamilton states in *The Federalist No. 65*:

> Is [impeachment] not designed as a method of National Inquest into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body . . . .

THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

64. The Senate trial procedure was adopted by the Senate in 1935 to streamline the Senate impeachment trial system. The Rule XI evidence committee was not used until the impeachment of Harry Claiborne in 1986. *See infra* Part III(A) (discussing the impeachment of Harry Claiborne) and *infra* Part IV(B) (discussing the Supreme Court's treatment of Senate trial by committee).

65. BLACK, *supra* note 61, at 9. One scholar has used the "prosecutor" analogy to describe the actions of the House in investigating alleged judicial misconduct. *Id.* at 5-9. *See also* CONGRESSIONAL QUARTERLY, IMPEACHMENT AND THE U.S. CONGRESS 17 (Mar. 1974) (noting the "prosecutorial" role of the House in investigating impeachments and presenting the articles of impeachment to the Senate for trial); Black, *supra* note 61, at 7-8 (noting the prior procedure of the House to use one of its own committees to investigate possible impeachable conduct; such committee investigations were generally conducted with testimony and documents available through subpoena). This investigative power given to committees, as described by Black, is remarkably similar to the authority granted the judiciary through the Judicial Councils Act.

the committee.[66] If two-thirds of the Senate votes to convict the judge on any of the articles of impeachment, the judge is impeached.[67]

III. The Modern Impeachment Cases

Since 1986 there have been three impeachments. Because judges are ideally men and women of unusually high integrity, it is not surprising that prior to those three impeachments there had not been one in fifty years.[68] The modern impeachment cases provide a framework for a discussion of the problems associated with the current impeachment process.

A. Judge Harry E. Claiborne

The first of the recent impeachments was the case of Judge Harry E. Claiborne of the U.S. District Court for the District of Nevada.[69] In 1983 a federal grand jury indicted Judge Claiborne for bribery, tax-fraud, and false statements.[70] His first trial ended in a mistrial.[71] The prosecutors then dropped the charges relating to bribery and retried the judge on the unrelated tax fraud and false filing counts.[72] Throughout the proceedings, the Judge asserted that he was the victim of a prosecutorial vendetta due to his rulings adverse to the Department of Justice in criminal cases.[73] In the second trial, Judge Clai-

66. For a discussion of the use of the Senate Committee to facilitate an impeachment trial, see VOLCANSEK, *supra* note 36, at 54 (presenting the Senate impeachment trial by committee in the context of the impeachment of Judge Harry E. Claiborne). *See also infra* section III(A) (discussing the impeachment of Judge Harry E. Claiborne).

67. BLACK, *supra* note 61, at 9-14.

68. The impeachment of Judge Halstead Ritter occurred in 1936. CONSTITUTIONAL PRESIDENTIAL IMPEACHMENT, *supra* note 6, at 48-51. In the period from 1799 to 1936, the House of Representatives impeached just 13 federal officers. Of these, 10 were jurists. Interestingly, all of the impeached officials have been male; no female officer has ever been impeached. ELEANORE BUSHNELL, CRIMES, FOLLIES AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 9-10 (1992).

69. PROCEEDINGS OF THE U.S. SENATE IN THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE, S. DOC. NO. 48, 99th Cong., 2d Sess. 11-12 (1986) [hereinafter CLAIBORNE SENATE IMPEACHMENT].

70. United States v. Claiborne, 870 F.2d 1463, 1464 (9th Cir. 1989).

71. United States v. Claiborne, 781 F.2d 1327, 1327 (9th Cir. 1986) (Reinhardt, C.J., dissenting from order denying rehearing en banc), *cert. denied*, 475 U.S. 1120 (1986).

72. *Id.*

73. *Id.* at 1328. During the impeachment debate, Senator Levin stated that "evidence clearly suggests that the Government engaged in a pattern of selective prosecution, prosecutorial overreaching, and perhaps intimidation of witnesses and other improprieties." 132 CONG. REC. S16,823 (daily ed. Oct. 16, 1986). It has been argued that the Judicial Councils Act, as it stands, encourages the political targeting of controversial and outspoken judges. Drew E. Edwards, Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CALIF. L. REV. 1071 (1987).

borne was acquitted of false filing, but was convicted on the charge of tax fraud.[74] A specially selected panel of three judges from other circuits affirmed his conviction.[75] Judge Claiborne requested that his post-conviction appeal be heard en banc,[76] but his request was denied.[77] After the Judicial Conference recommended that impeachment might be warranted, the House of Representatives drew up articles of impeachment for Judge Claiborne, based largely on his earlier criminal conviction,[78] and referred the articles to the Senate. The Senate tried Judge Claiborne by committee and convicted him of three of the articles of impeachment against him.[79]

B. Judge Alcee Hastings

The case of Alcee Hastings,[80] former U.S. District Judge for the Southern District of Florida, presents a unique situation. In 1979 Judge Alcee Hastings became the first African-American judge to be appointed to the federal bench in Florida.[81] In 1981 Judge Hastings was indicted for conspiring to receive a bribe.[82] Judge Hastings was acquitted of all criminal charges,[83] while his alleged coconspirator was

Judge Claiborne argued that this vendetta would result in "chilling" judicial independence if the prosecutors were successful. *Claiborne*, 870 F.2d at 1465. For a detailed discussion of the adverse affect of stifling judicial decision making, see Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979).

74. *Claiborne*, 870 F.2d at 1464.

75. United States v. Claiborne, 765 F.2d 784, 784 (9th Cir. 1985).

76. *Claiborne*, 781 F.2d at 1329 (Reinhardt C.J., dissenting).

77. *Id.* at 1325 (Ferguson, J., dissenting).

78. CLAIBORNE SENATE IMPEACHMENT, *supra* note 69, at 14-15.

79. *Id.*

80. Hastings v. Judicial Conference of the United States, 829 F.2d 91 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988) [hereinafter *Hastings III*]; Hastings v. Judicial Conference of the United States, 657 F. Supp. 672 (D.D.C. 1986), *aff'd in part and rev'd in part on other grounds sub. nom. In re* Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir. 1986), *cert. denied sub nom.* Hastings v. Godbold, 477 U.S. 904 (1986) [hereinafter *Hastings II*]; Hastings v. Judicial Conference, 593 F. Supp. 1371 (D.D.C. 1984), *aff'd in part and vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 447 U.S. 904 (1986) [hereinafter *Hastings I*]; *In re* Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), *aff'd*, 735 F.2d 1261 (11th Cir. 1984), *cert. denied sub nom.* Hastings v. Investigating Committee for the Judicial Council of the Eleventh Circuit, 469 U.S. 884 (1984) [hereinafter *Hastings Petition*].

81. *Hastings I*, 593 F. Supp. at 1375 (1984); *see also Alcee Hastings Impeachment Inquiry: Hearings on H. Res. 128 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 2 (1988) [hereinafter *Hastings House Impeachment*].

82. *Hastings I*, 593 F.Supp. at 1375.

83. *Id.* at 1376.

convicted in a separate trial.[84] Judge Hastings alleged that racial discrimination within the Justice Department was the motivation behind the case.[85] Following his acquittal, two of Judge Hastings's col-

84. United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

It has been noted that impeachment is an independent inquiry, and an impeachable offense may include a noncriminal act. However, the incidence of independent judicial investigation has been diminished when impeachment follows a criminal conviction. *See* VOLCANSEK, *supra* note 36, at 140. This trend was codified in the Judicial Councils Act:

> If a judge . . . has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction . . . the Judicial Conference may, by majority vote and without referral or certification [from the judicial council,] . . . transmit to the House of Representatives a determination that consideration of impeachment may be warranted . . . .

Judicial Councils Act of 1990, Pub. L. No. 101-650, § 402(d) (codified at 28 U.S.C. § 372(c)(8) (1993)). This approach was first advocated by Robert N. Kastenmeier (Member of Congress and Chairman of the House Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice) and Michael J. Remington (Chief Counsel, Subcommittee on Courts, Civil Liberties, and the Administration of Justice) in *Symposium on Judicial Discipline and Impeachment, Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 784 (1988). *See also* Michael J. Broyde, *Expediting Impeachment: Removing Article III Federal Judges After Criminal Conviction*, 17 HARV. J.L. & PUB. POL'Y 157, 158 (1994) (arguing that the House of Representatives should establish an objective standard for "automatic" impeachment of federal judges who have been convicted of certain crimes in federal court); Maria Simon, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1619 (1994) (arguing that the removal and disqualification of an Article III judge convicted under a federal criminal statute supports the removal of that judge from office without resorting to the impeachment mechanism at all).

85. *See The Perplexing Case of Judge Alcee Hastings*, WASH. POST, July 7, 1988, at C1. This allegation presents an interesting issue. It is significant that of the five criminal judicial convictions since 1980, three of the judges are minorities. This is a disparate ratio considering the minuscule number of minorities within the federal judiciary. The other two cases not addressed in this Note either have not yet or will not reach impeachment. One concerns Judge Robert P. Collins of the Eastern District of Louisiana, who was convicted of accepting a bribe. The other case involves Judge Robert P. Aguilar of the Northern District of California, convicted of an unlawful wiretap disclosure. *See* Robert S. Peck, *Jurist Before the Bench, Challenging Impeachment Procedures for Federal Judges*, A.B.A. J., Feb. 1993, at 60. Judge Collins is currently in prison, having exhausted all appeals. *See* United States v. Collins, 972 F.2d 1385 (5th Cir. 1993), *cert. denied*, Collins v. United States, 113 S. Ct. 1812 (1993). On June 22, 1993, the Judicial Conference certified to the House of Representatives that impeachment of Collins may be warranted. However, Judge Collins resigned his office upon exhaustion of his appeals. *National Commission Report*, *supra* note 33, at 74.

Judge Aguilar's case presents a different matter. On April 19, 1994, an en banc panel of the United States Court of Appeals for the Ninth Circuit overturned Judge Aguilar's convictions on all counts. United States v. Aguilar, 21 F.3d 1475, 1487 (9th Cir. 1994), *cert. granted* 115 S. Ct. 571 (1994). Nevertheless, Judge Aguilar may still face the judicial council, which must decide whether and to what extent the Judge should be disciplined. Howard Mintz, *It's Not Over Yet for Aguilar*, THE RECORDER (San Francisco), May 6, 1994, at A1.

leagues[86] filed a complaint alleging, among other things, that Judge Hastings had committed the crime for which he was charged.[87] Pursuant to the Judicial Councils Act, the Chief Judge of the Eleventh Circuit appointed a committee to investigate the complaint.[88] Judge Hastings filed four lawsuits to enjoin the investigation, yet was denied relief.[89] The judicial investigating committee hired an investigative team charged with the task of compiling a record of the events surrounding Hastings's case.[90] The investigating committee hearings were not limited by the rules of evidence.[91] The committee concluded that Hastings was guilty of the bribery charge and unanimously recommended that impeachment of Hastings might be warranted.[92] The committee certified its findings to the Judicial Conference.[93] The Conference reviewed the documents and voted to recommend Has-

86. The complaining judges were Judge William Terrell Hodges of the U.S. District Court for the Middle District of Florida and Chief Judge Anthony A. Alaimo of the U.S. District Court for the Southern District of Georgia. Both are members of the Eleventh Circuit Judicial Council. *Hastings I*, 593 F. Supp. at 1376 n.11.

87. *Id.* at 1376 ("Confronted with the fact that Judge Hastings was the only alleged co-conspirator, the Court determined in affirming the jury's conviction of Borders on the conspiracy count that the jury must have on all the evidence properly concluded that Judge Hastings had conspired with Borders."). The complaining judges also alleged that Judge Hastings:

> (2) . . . made "public and unfounded statements" that the United States was prosecuting him on racial/political grounds; (3) . . . knowingly and publicly exploited his judicial position . . . by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense; (4) . . . had allowed *ex parte* contacts between his law clerk and counsel . . . and had "completely abdicated and delegated" his judicial decision-making authority to his law clerk; (5) . . . told counsel in a judicial proceeding that he had read an important precedent when he knew he had not . . . (6) . . . exploited his judicial position by soliciting funds for . . . a convicted federal offender.

Id. at 1376-77.

88. *Id.* at 1377. The investigating committee of the Judicial Council of the Eleventh Circuit consisted of John C. Godbold, Chief Judge of the Eleventh Circuit, U.S. Circuit Judges Gerald Bard Tjoflat and Frank M. Johnson, and U.S. District Judges Sam C. Pointer and William C. O'Kelley. The committee named John Doar, a private attorney, as its counsel. *Id.* at 1377.

89. *See In re* Grand Jury Proceedings, 841 F.2d 1048 (11th Cir. 1988) (before Judges Gilbert S. Merritt, Nathaniel R. Jones, and Ralph B. Guy of the Sixth Circuit); *In re* Request for Access to Grand Jury Materials, 833 F.2d 1438, 1439 (11th cir. 1987) (before the same panel); *In re* Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1491 & n.1 (11th Cir. 1986) (before Chief Judge Levin H. Campbell of the First Circuit, Judge Amalya Lyle Kearse of the Second Circuit, and Wilbur F. Pell of the Seventh Circuit), *cert. denied*, 477 U.S. 904 (1986); *In re* Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1262, 1263 (11th Cir. 1984).

90. *See Hastings I*, 593 F. Supp. at 1377; *see also* VOLCANSEK, *supra* note 36, at 87.

91. VOLCANSEK, *supra* note 36, at 87.

92. *Hastings III*, 829 F.2d at 96.

93. *Id.*

tings's impeachment to the House of Representatives.[94] The House then held additional hearings, found that there was sufficient evidence to impeach,[95] and sent the articles to the Senate. The Senate committee took testimony and prepared a report for the full Senate,[96] which voted to impeach Hastings. Hastings vociferously contested the impeachment proceedings at every stage, from the judicial investigating committee hearings under the Judicial Councils Act to the Senate trial by committee pursuant to Senate Rule XI. Through federal court litigation, he vigorously challenged the Senate's use of a committee to hear the evidence against him instead of allowing him to present his case before the full Senate. Judge Sporkin, District Judge for the District of Columbia, held that a life-tenured, Article III judge who has been acquitted of felony charges cannot thereafter be impeached and tried on essentially the same charge by a committee of Senators consisting of less than the full Senate.[97] Ironically, once acquitted of the impeachment, Judge Hastings was elected to the United States House of Representatives, where he currently serves the Twenty-third District of Florida as a member of the body that impeached him.

C. Judge Walter L. Nixon, Jr.

The case against Walter L. Nixon, Jr.,[98] adds another dimension to the criticism of the impeachment process. In 1984 Judge Nixon,

94. *Id.*; *Congress Reluctantly Takes up Hastings' Ouster*, LEGAL TIMES, Mar. 30, 1987, at 2; H.R. Res. 128, 100th Cong., 1st Sess. (1987), 133 CONG. REC. H1506, H1514 (daily ed. Mar. 23, 1987) ("[O]n March 17, 1987, Chief Justice Rehnquist, acting on behalf of the Judicial Conference, transmitted to the Speaker of the House of Representatives a determination that the impeachment of United States District Judge Al Hastings may be warranted.").

95. H. Res 499, 100th Cong., 2d Sess. (1988).

96. REPORT OF THE IMPEACHMENT TRIAL COMM. ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, S. REP. NO. 156, 101st Cong., 1st Sess. 1 (1989) [hereinafter HASTINGS SENATE IMPEACHMENT]. Hastings also sought injunctive relief from the District of Columbia District Court during the Senate trial. Hastings v. United States Senate, 716 F. Supp. 38, 39 (D.D.C. 1989), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989). District Judge Gerhard Gesell dismissed the claim, finding that Hastings failed to establish a clear constitutional violation. *Id.* at 43. The Court of Appeals for the District of Columbia Circuit affirmed, stating that Hastings's challenges were not ripe. Hastings v. United States Senate, 887 F.2d 332 (D.C. Cir. 1989).

97. Hastings v. United States, 802 F. Supp. 490, 505 (D.D.C. 1992). In that case, Judge Sporkin found that Hastings's objection to the Senate committee was not precluded by the grant of certiorari in Nixon v. United States (*see infra* Part III.C), which presented an identical issue. *Id.* at 493. Nevertheless, on March 2, 1993, the District of Columbia Court of Appeals vacated Judge Sporkin's decision without opinion. Hastings v. United States, 988 F.2d 1280 (D.C. Cir. 1993). In light of the Supreme Court's decision in *Nixon*, Judge Sporkin dismissed the action on October 21, 1993 in a brief opinion. Hastings v. United States, 837 F. Supp. 3 (D.D.C. 1993).

98. *See* Nixon v. United States, 744 F. Supp. 9, 10 (D.D.C. 1990), *aff'd*, 938 F.2d 239 (D.C. Cir. 1991), *aff'd*, 113 S. Ct. 732 (1993).

formerly the Chief Judge of the United States District Court for the Southern District of Mississippi, was indicted on one count of bribery and three counts of perjury before a grand jury.[99] He was acquitted of the bribery charge and one count of the perjury charge, but was convicted on the other two counts of perjury.[100] Judge Nixon noted the irony of the perjury convictions—he was convicted of perjury based on statements he made to the grand jury supporting his innocence of the bribery charge.[101] Judge Nixon's convictions were upheld on appeal.[102] Even in the face of a criminal conviction, Judge Nixon refused to resign his judicial position. He, like Judge Claiborne, contended that he was being unjustifiably prosecuted based upon controversial rulings against the government.[103] Despite that claim, the House of Representatives approved three articles of impeachment against Judge Nixon.[104] The Senate, pursuant to Senate Procedural Rule XI, appointed a twelve-member committee to receive and report evidence. The committee conducted four days of hearings, received testimony from ten witnesses including Nixon, and then submitted a transcript and summary of its proceedings to the full Senate. The Senate convicted him of two of the three articles[105] and removed him from office.[106]

Nixon brought an action in the United States District Court for the District of Columbia challenging Senate Rule XI, which authorized the use of a committee to hear impeachment trials.[107] Nixon argued that the Constitution required the full Senate to try his impeachment, instead of the twelve-member committee of Sena-

99. *Nixon*, 744 F. Supp. at 10.

100. *Id.*

101. Brief for Petitioner at 17-18, Nixon v. United States, 113 S. Ct. 732 (1993); *Walter L. Nixon Impeachment Inquiry: Hearings on H. Res. 407 Before Subcomm. on Civil and Constitutional Rights*, 100th Cong., 2d Sess. 979-80 (1988) (app. 1, no. 96) [hereinafter *Nixon House Impeachment*].

102. United States v. Nixon, 816 F.2d 1022 (5th Cir. 1987); *see also* United States v. Nixon, 881 F.2d 1305 (5th Cir. 1989) (affirming lower court's denial of judge's motion to vacate conviction); United States v. Nixon, 827 F.2d 1019 (5th Cir. 1987) (denying petition for rehearing en banc); Nixon v. United States, 703 F. Supp. 538 (S.D. Miss. 1988) (denying motion to vacate conviction).

103. One relevant case is the land condemnation case of Petit Bois Island in the Gulf of Mexico, in which Nixon ruled that the government was liable for more than six million dollars in damages. United States v. 717.42 Acres of Land, C.A. No. S80-0450(N) (S.D. Miss), *cited in Nixon House Impeachment*, *supra* note 101, at 1156-57.

104. *Nixon*, 744 F. Supp. at 10.

105. *Id.* at 10.

106. *Id.*

107. *Id.* at 9. Senate Rule XI allows the appointment of "a committee of Senators to receive evidence and take testimony," which then compiles a transcript of the proceedings, testimony, and all evidence upon which the full Senate votes. RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS XI, XXII, *reprinted in* SENATE MANUAL, S. DOC. NO. 1, 101st Cong., 1st Sess. 186-87, 188 (1989).

tors.[108] He also claimed that because the full Senate had failed to perform the fact-finding inherent in a trial, the Senate had failed to "try" him pursuant to the constitutional mandate.[109] The District Court dismissed his claim as a nonjusticiable political question.[110] Nixon appealed to the Court of Appeals for the District of Columbia Circuit.[111] The Court of Appeals unanimously affirmed the decision of the district court, with each judge of the three-judge panel writing separately.[112] In the opinion for the court, Judge Williams based his finding of nonjusticiability on his reading of the text and history of the Impeachment Trial Clause.[113] Judge Randolph concurred, finding review of the Senate impeachment rules to be nonjusticiable based on prudential separation of powers concerns.[114] Judge Edwards concurred in part and dissented in part, finding the question justiciable, but determining on the merits that the Senate had indeed tried Nixon.[115] Nixon further appealed his case to the U.S. Supreme Court,[116] which affirmed his conviction, relying on the elusive political question doctrine.[117]

108. *Nixon*, 744 F. Supp. at 10. The constitutionality of Senate impeachment by committee is beyond the scope of this Note. However, this issue is discussed in depth by several commentators. *See* Rose Auslander, Note, *Impeaching the Senate's Use of Trial Committees*, 67 N.Y.U. L. REV. 68 (1992) (observing that the text of the Constitution and the history of the Framers' intent suggest that the full Senate is required to hear impeachments); Daniel Luchsinger, Note, *Committee Impeachment Trials: The Best Solution?*, 80 GEO. L.J. 163 (1991) (arguing that the current committee procedure is unconstitutional and proposing a revision allowing the committee to make the initial determination as to the guilt or innocence of the accused). *But see* Mitch McConnell, *Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change*, 76 KY. L.J. 739 (1988) (arguing that significant economies are achieved in the Senate through the committee procedure without abdicating any of its responsibilities to hear, consider, and judge before convicting).

109. *Nixon*, 744 F. Supp. at 10.

110. *Id.* at 14. When a political question is found, the case will involve

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

111. Nixon v. United States, 938 F.2d 239 (D.C. Cir. 1991) (Williams, J., with Randolph, J., concurring, and Edwards, J., dissenting in part and concurring in the judgment).

112. *Id.* at 246.

113. *Id.*

114. *Id.* at 246-48 (Randolph, J., concurring).

115. *Id.* at 248-65 (Edwards, J. dissenting in part and concurring in the judgment).

116. Nixon v. United States, 113 S. Ct. 732 (1993).

117. *Id.* at 734.

IV. Toward Due Process Guarantees in the Impeachment Process

Because the Constitution does not define the words within it precisely, it is within the province of the judiciary to define those terms.[118] The *Nixon* Court's decision to abdicate this duty through the use of the political question doctrine leaves a process with no check on the rules of Congress, thus upsetting the delicate system of checks and balances established in the United States Constitution.[119] The political nature of the initiation of impeachments[120] and the magnitude of the consequences of impeachment[121] justifies a thorough probing into the necessity of impeachment in each case. Honesty, consistency, and fairness should be guarantees of our impeachment process; instead, they are left to happenstance.

A. Due Process

Both the Fifth and Fourteenth Amendments to the Constitution prohibit governmental actions that would deprive any person of certain entitlements.[122] The employment of the Judicial Councils Act does not override the protection afforded accused judges by the Fifth

118. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

119. The justiciability of legislative impeachment rules has been discussed extensively in the academic literature. *See generally* Thomas D. Amrine, Comment, *Judicial Review of Impeachment Proceedings*, 19 HARV. J.L. & PUB. POL'Y 809 (1993); Auslander, *supra* note 108, at 107 (noting that the political question doctrine should not bar judicial review of Senate impeachment rules); Brendan C. Fox, Note, *Impeachment: The Justiciability of Challenges to the Senate Rules of Procedure for Impeachment Trials*, 60 GEO. WASH. L. REV. 1275, 1310 (1992) ("The political question doctrine should not act as a bar to the justiciability of impeachment procedure claims under the classic *Baker v. Carr* standards . . . ."); Lisa A. Kainec, Note, *Judicial Review of Senate Impeachment Proceedings: Is a Hands Off Approach Appropriate?*, 43 CASE W. RES. L. REV. 1499 (1993) (arguing that the Supreme Court should review Senate Impeachment rules); Michael Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIF. L. REV. 1341 (1990) (arguing courts should intervene when private litigants are involved); Nicole H. Schneider, Comment, *Senate Impeachment Trials—To Review or Not To Review, What Would Marshall Do?*, 4 SETON HALL CONST. L.J. 237 (1993) (arguing in favor of the justiciability of Senate impeachment trial rules); David Todd Smith, Note, *Constitutional Law—Impeachment Trial Clause*, 25 ST. MARY'S L.J. 855 (1994) (arguing that the Supreme Court should review legislative rules in extreme circumstances).

120. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

121. An impeachment conviction results in expulsion from the judiciary and the subsequent loss of salary, pensions, and other benefits ordinarily due. *See* THE FEDERALIST NO. 65, at 399 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (acknowledging the grave loss of livelihood and estate in an impeachment trial).

122. The Fifth Amendment to the United States Constitution provides the guarantee that "[n]o person shall be deprived of life, liberty, or property, without due process of law." "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

Amendment. However, the Act's procedures deny accused judges the procedural protections of a neutral decision maker, judicial review of the process, and public access to investigation findings, in contravention of due process.

To ascertain an individual's entitlement to due process, the U.S. Supreme Court applies a two-pronged analysis. The Court first asks whether life, liberty, or property are implicated, and if so, then asks what process is due.[123] Article III judges are granted constitutionally protected life tenure and salary protection, both of which are property interests under the Constitution, and are therefore entitled to due process before their removal.[124]

In determining whether procedural protection is due, courts look to the extent to which the individual will be "condemned to [suffer] grievous loss."[125] This examination includes consideration of the precise nature of the government function involved, and the private interest that has been affected by the government action.[126] When due process is implicated, the individual has a right to "a fair procedure" to determine the basis for and legality of the government's action.[127] Because determinations of what and how much process is due are flexible, the specific dictates of due process requirements have been condensed to consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[128]

When these factors are applied to the impeachment process, the only conclusion is that the Judicial Councils Act fails to accord an accused judge the full panoply of due process protections.

First, because Article III judges are constitutionally guaranteed salary protection and life tenure, such judges have a strong private interest. Judges risk losing their reputations as a result of a finding of misconduct, and their futures as jurists are threatened. Sanctions a judge may face range from a suspension of duties to a recommenda-

123. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.1 [hereinafter NOWAK & ROTUNDA].

124. A property interest has been found when an employee has tenure in her position. Perry v. Sinderman, 408 U.S. 593, 602 (1972).

125. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

126. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

127. NOWAK & ROTUNDA, *supra* note 123, § 13.1, at 487.

128. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Zinermon v. Burch, 494 U.S. 113, 127 (1990).

tion of impeachment—each of which jeopardizes the jurist's future ability to conduct the business of the courts by diminishing the public confidence in the judge's integrity. Impeachment will likely also hamper the jurist's ability to gain future employment, as it carries with it the stigma of having betrayed the public trust.

Other factors affecting the amount of process due arise differently at two distinct points in the impeachment process—first, during the judicial council investigation of an accused judge, and second, when an accused judge challenges any part of the process through the federal courts.

(1) The Judicial Council Investigation Under the Judicial Councils Act

The second factor in determining the requirements of due process is the risk of erroneous deprivation. The risk of such deprivation in impeachment proceedings is substantial. Three particular aspects of the impeachment process increase this risk: the lack of meaningful judicial review of the impeachment process; the relative sophistication and secrecy with which judicial impeachment investigations are conducted; and the lack of an effective mechanism to deal with conflicts of interest between the accused judges and the investigating judges.

Although the investigating committee is composed of federal judges who are often more sophisticated than lay people, the decision-making process can become strained. Judicial review on appeal is acknowledged as a necessary component of American jurisprudence because a multi-layered approach to adjudications is often appropriate and helpful in guaranteeing fairness to litigants. Nevertheless, in Judicial Council proceedings, judicial review is explicitly precluded.[129] Although the statute notes that a judge may appeal a decision of a judicial council to the Judicial Conference, it is still within the discretion of the Judicial Conference to accept or reject the appeal, leaving an accused judge with no recourse.[130] This is exacerbated by the geo-

129. 28 U.S.C. § 372(c)(10) (1993) states:

> A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The judicial conference, or the standing committee . . . , may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

130. Judge Edwards, Circuit Judge for the District of Columbia Circuit, noted the problematic nature of the language of section 373(c)(10), stating that because this language could be construed as precluding review of challenges to the legality of the decision-making processes of judicial councils, due process could be denied an accused judge. *Hastings I*, 770 F.2d at 1109 (Edwards, J., concurring). Despite the lack of a definitive statement

graphic proximity of the judges selected to serve on the investigating committee. Because the judges are all selected from the accused judge's circuit, disparate treatment of like cases based on personal associations is possible. Without judicial review, these biases are unlikely to be effectively countered.

The risk of erroneous deprivation is further enhanced by the nature of the impeachment investigation of an accused judge. The issues of judicial competence or misconduct are highly fact-specific. Nevertheless, because misconduct is often private and therefore not obvious, the alleged misconduct may be difficult to establish. Thus, in impeachment proceedings, it may be necessary to engage the assistance of investigators, in addition to commanding information through the subpoena power granted investigating committees. This is particularly true when the investigation does not follow a criminal conviction.

Additionally, the Judicial Councils Act allows judicial investigations to be conducted under a shroud of secrecy.[131] Public scrutiny is a significant deterrent to misconduct of any sort. Public knowledge of the actions of investigating committees, in addition to Judicial Council recommendations as the scheme currently requires, would bolster public confidence in the judiciary by mitigating the appearance of either partiality toward or persecution of judges under investigation.

The risk of erroneous deprivation of the judge's property interest is likewise increased because the Act fails to provide a procedure for resolving conflicts of interest among investigating committee members and the accused.[132] "The government always has the obligation of providing a neutral decision-maker—one who is not inherently biased against the individual or who has personal interest in the outcome."[133] However, within a judicial council's disciplinary hearings, once judges have been selected to sit on an investigating committee there is no formal mechanism for those judges to recuse themselves, nor are there any standards set for such recusal. Although judges are ideally men and women of great integrity, it is likewise clear that conflicts of interest do occur. Judges of the same circuit may find it inappropriate to

from the Supreme Court on the constitutionality of the Judicial Councils Act, courts have allowed facial challenges to the Act. At least one court has disallowed an individual judge's challenge to the Act as applied to him. *Hastings I*, 593 F. Supp. at 1378. Circuit Judge D.H. Ginsberg of the Court of Appeals for the District of Columbia stated in a footnote that "sensitive and unsettled questions of constitutional law would arise if [Judge Hastings's] challenges are covered by the prohibition on judicial review." *Hastings III*, 829 F.2d at 107-08 n.69 (citing Weinberger v. Salfi, 422 U.S. 749, 762 (1975)). The court remanded the case to the district court, but prior to that adjudication, Hastings was impeached in Congress. *See supra* Part III.B.

131. 28 U.S.C. § 372(c)(14)(A)-(C) (1993); *see supra* Part II (discussing confidentiality of committee disciplinary investigations).

132. *See supra* Part I.

133. NOWAK & ROTUNDA, *supra* note 123, § 13.1, at 488; *Morrissey*, 408 U.S. at 489.

pass on questions of misconduct regarding one of their colleagues. The risk that judges may protect their colleagues, or may be unjustifiably harsh on their colleagues, is substantial. One judge may find that the accused judge has been the victim of an erroneous complaint, while another judge may find the embarrassment of judicial misconduct for all of the judiciary so great that the judge may approach the investigation with contempt. In any misconduct investigation, the search for truth must be the underlying motivating force. If any other factor may potentially become an issue, risk of disparate procedures is heightened. In order to ensure that erroneous deprivations do not occur, the Judicial Councils Act must make provisions for the conflicts of interest that are inevitable.

In addition to conflicts of interest based on personal affiliations, under the current system, an accused judge may face impeachment investigation proceedings in which a judge with prior exposure to the case is participating—the likelihood of which is increased by an imperfect recusal mechanism—with no possibility of judicial review or public scrutiny. Under these procedures, "the risk of unfairness is intolerably high."[134]

Third, the considerations of due process require an appraisal of the government's interest, including the function involved and the fiscal and administrative burdens that additional procedural requirements would entail.[135] In the impeachment investigation context, the government's interest is in eradicating misconduct from the judiciary and satisfying the public's interest in limiting the administrative and fiscal burdens imposed as a result of providing due process protections of judicial review, public availability of decisions, and conflict of interest mechanisms. The cost to the government includes the generally small cost of allowing judicial review of the relatively few impeachment investigation cases. Additionally, making the public aware of the impeachment process should entail virtually no cost, other than basic costs of reproduction and distribution of committee investigation reports. The conflict of interest mechanism may be more costly. In order to provide for alternative judges to take the place of recused judges on investigating committees, the provision of resources will be increased somewhat. However, the relative infrequency of impeachment investigations mitigates against an unmanageable cost to the government.

Balanced against those costs are the benefits to be derived from the preservation of the sanctity of the federal judiciary, the independence of federal judges, and the maintenance of the confidence of the public. The fair and just adjudication of judicial misconduct is itself a

134. Withrow v. Larkin, 421 U.S. 35, 58 (1975).
135. *See supra* note 128 and accompanying text.

benefit to the government and to society. Moreover, judges are entrusted with the very lives of the litigants who come before them. Therefore, the public confidence in the federal judiciary as a whole will be further diminished by the presence of judges whose honor has been called into question. Finally, in the American common law system, the decisions of federal judges must be inherently reliable in order to maintain the sanctity of a system that relies heavily on precedent. It is necessary for federal judges to trust the decisions of their colleagues in order to preserve the sanctity of the process as a whole.

The case of Judge Hastings is illustrative of the current due process problems with judicial council investigations.[136] Upon receipt of the initial complaint filed against Judge Hastings, the Chief Judge appointed a committee to investigate.[137] Pursuant to the Judicial Councils Act, the Chief Judge has complete discretion to select the investigating judges.[138] In choosing an investigating committee, the Chief Judge of the Eleventh Circuit appointed the circuit judge who had written the decision in the appeal of Hastings's alleged coconspirator.[139] The opinion in the coconspirator's appellate case "recited in detail the evidence against Hastings"; yet this judge stayed on the committee and heard Hastings's case.[140] The impartiality of the assigned judge could reasonably be questioned because of the substantial likelihood that he may have already determined the guilt of the accused. Because the disciplinary investigation is essentially unguarded by such standard protections as judicial review and public scrutiny, the appointment of the judge who will decide the case is of paramount significance. In this case, a judge intricately involved in the alleged coconspirator's original case was chosen to participate in the subsequent impeachment investigation, in direct contravention of the Framers' mandate that the accused should not be subjected to the scrutiny of one who may have predetermined a judge's guilt through involvement in a criminal proceeding.

The Framers of the Constitution explicitly considered the rights of accused judges and included due process protections at the forefront of their debates. This constitutional mandate has been circumvented in the impeachment process by allowing judges involved in the determination of the guilt of an individual in a criminal proceeding to preside in a subsequent impeachment proceeding based on the same

136. *See supra* Part III (discussing the most recent federal impeachment cases).

137. *Id.*

138. 28 U.S.C. § 372(c)(4)-(5) (1993).

139. *Hastings Petition*, 735 F.2d at 1263-64.

140. *Hastings I*, 593 F. Supp. at 1376. *See Borders*, 693 F.2d at 1318. Interestingly, when Hastings challenged the judge's participation as a violation of due process, the court repeatedly failed to reach the issue.

alleged misconduct.[141] Incorporating due process safeguards into the impeachment process will facilitate fact finding and secure the judge's perceived due process. Failure to subject evidence to the most rigorous examination possible is not only harmful to the accused judge, but also injures the justice system by exposing it to claims of impropriety.

(2) Court Challenges to the Constitutionality and Parameters of the Judicial Councils Act Itself

The federal judiciary's role in the impeachment process is twofold. Not only do Article III judges participate intimately in the internal investigation of complaints against judges, but Article III judges also have repeatedly been called upon to determine the constitutionality and parameters of the Judicial Councils Act itself. Both Judges Claiborne and Hastings challenged the legitimacy and scope of the Judicial Councils Act.[142] Conversely, Judge Nixon rested his legal contests on the validity of the Senate's trial by committee.[143] A recurring question in the Claiborne and Hastings cases was the extent to which recusal of judges from the accused judge's circuit would have been appropriate.[144] The propriety of circuit recusal in each case has

141. Scholars have questioned the propriety of any discipline of federal judges other than impeachment. *Compare* Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765 (1989) (arguing that any regulation short of impeachment should be through judicial self-regulation that does not include congressional interference); C. Randolph Fishburn, *Constitutional Judicial Tenure Legislation? The Words May be New, But the Song Sounds the Same*, 8 HASTINGS CONST. L.Q. 843, 851 (1981) (arguing that impeachment is the sole constitutional means for removal); Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209 (1991) (arguing that the integrity of the impeachment process is undermined if criminal prosecution of a judge precedes impeachment); Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985) (arguing that impeachment should be the sole method for investigating, trying, and punishing Article III judges for noncriminal misbehavior); and Melissa H. Maxman, Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420 (1987) (arguing that prosecuting a federal judge prior to impeachment undermines judicial independence) *with* Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could Be Mis-Regulation*, 89 MICH. L. REV. 609 (1990) (rejecting Judge Edwards's plea for judicial self-regulation as unworkable due to a perceived tendency in the judicial culture to cover up judicial misbehavior) and Patrick Donald McCalla, Note, *Judicial Disciplining of Federal Judges Is Constitutional*, 62 S. CAL. L. REV. 1263 (1989) (arguing that disciplining federal judges does not violate the Constitution).

142. *See supra* Parts III(A) and (B) (discussing the challenges of Claiborne and Hastings).

143. *See supra* Part III(C) (discussing Nixon's challenge to the Senate's impeachment procedures).

144. *Claiborne*, 870 F.2d at 1464-67; Hastings cases, *supra* note 80. Judges are selected to replace recused judges pursuant to 28 U.S.C. § 291(a) (1993), which provides:

> The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certif-

been approached in an ad hoc manner, resulting in unpredictable decisions.

Inherent in the American judicial system are mechanisms for judges to recuse themselves from a case.[145] A judge must preside over a proceeding in an unbiased manner[146] and with the appearance of impartiality. If there is an appearance of bias or partiality, judges may recuse themselves from a particular case or be disqualified.[147] Two broad types of situations warrant compulsory judicial disqualification: personal bias or prejudice, either in fact or appearance, and personal involvement by the judge in the matter or controversy.[148]

Lawyers and litigants expect that judges will recuse themselves voluntarily when their impartiality may legitimately be questioned. Judges are generally in a better position to determine whether to recuse themselves from a case. If such potential exists, the judge will

---

icate of necessity by the Chief Judge of Circuit Justice of the circuit wherein the need arises.

The Rule of Necessity requires that a forum be made available for litigants, thus preventing recusal of all Article III judges from participating in judicial council proceedings. *Hastings Petition*, 576 F. Supp at 1280 (citing United States v. Will, 449 U.S. 200, 217 (1980)).

145. The procedures for recusal of a federal judge are outlined in 28 U.S.C. §§ 144, 455 (1988) and Canon 3 of the ABA Code of Judicial Conduct. 28 U.S.C. § 144 (any judge shall be disqualified if a party to any proceeding makes and files a timely and sufficient affidavit showing personal judicial bias or prejudice); 28 U.S.C. § 455(a) (any justice, judge, or magistrate shall disqualify him or herself in any proceeding if his or her impartiality might reasonably be questioned). If a judge provides full disclosure on the record of the basis why his or her impartiality may reasonably be questioned, the parties may consent to the judge remaining on the case except in several circumstances specified in § 455(b). In determining whether a judge should recuse him or herself, courts apply a reasonable person standard. Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438 (1st Cir. 1992) (whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning judge's impartiality, not in the mind of the judge him or herself or even necessarily in the mind of the litigant filing the motion, but rather in the mind of the reasonable person); Yagman v. Republic Ins., 987 F.2d 622 (9th Cir. 1993) (whether a reasonable person with knowledge of all the facts would conclude that judge's impartiality might reasonably be questioned).

146. Personal bias usually refers to bias in favor of or against a specific party as opposed to judicial bias, which refers to prejudgment of the legal issues or merits. Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 668 (1985). *See generally* LESLIE ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 1-3 (describing the circumstances for judicial disqualification).

147. A party seeking to disqualify a judge must make and file a timely affidavit alleging the nature of the bias alleged. 28 U.S.C. § 144 (1988). The party may file only one affidavit in a judicial disqualification case and must include in the affidavit a statement of the facts and reasons for the belief that bias or prejudice exists. *See generally* Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435 (1966).

148. Parrish v. Board of Comm'rs, 524 F.2d 98, 100 (5th Cir. 1975) (en banc) (quoting United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973)), *cert. denied*, 425 U.S. 944 (1976).

not only recognize it, but ideally will act to ensure the integrity of the legal process.

Nevertheless, inherent problems in the impeachment process are not relieved by the mere fact that the mechanism of recusal exists.[149] The discretionary nature of recusal leaves open the possibility that judges with intimate familiarity with a case may still decide questions of procedural validity relating to subsequent impeachment proceedings. This practice contravenes constitutional due process requirements and the prudential goal of maintaining the appearance of propriety in judicial action. Discretion inherently leads to divergent decisions; when one judge may find that knowledge of a case or communication with an accused warrants her recusal, another judge faced with the same prior exposure may decide to continue presiding over the case.

Judge Claiborne faced the problems stemming from discretionary recusal several times. In his initial criminal trial, an out-of-circuit senior district judge was specially assigned to hear the case.[150] The district judge denied a series of pretrial motions filed by Judge Claiborne.[151] In Judge Claiborne's appeal of the pretrial rulings, the Ninth Circuit judges agreed to recuse themselves.[152] The Chief Justice then specially selected a panel of three judges from other circuits to hear the case.[153] The panel affirmed the pretrial rulings of the district judge.[154] Upon Judge Claiborne's subsequent conviction, he appealed again to the Ninth Circuit for en banc review.[155] Only six of the twenty-five circuit judges recused themselves from the vote.[156] The en banc vote represents the first time Ninth Circuit judges participated in Claiborne's criminal case.[157] Those judges who voted against the en banc hearing did so because of a perceived appearance of im-

149. *But cf.* Tuttle & Russell, *supra* note 63, at 609-10 (arguing that recusal is the appropriate remedy).

150. *Claiborne*, 781 F.2d at 1329-30 (Reinhardt, J., dissenting). Senior United States District Judge Walter E. Hoffman of the Eastern District of Virginia was designated by the Chief Justice to preside at trial.

151. *Id.* at 1330. The issue of one such pretrial motion was whether a federal judge could be subjected to criminal proceedings prior to impeachment. United States v. Claiborne, 727 F.2d 842, 843 (9th Cir. 1984). Judge Claiborne argued that because impeachment is the sole method of removing federal judges from the bench, criminal prosecution before impeachment resulted in an unconstitutional de facto removal. *Id.* at 846. For a comprehensive discussion of this issue, see Steven W. Gold, Note, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 BROOK. L. REV. 699 (1987).

152. *Claiborne*, 781 F.2d at 1330.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Claiborne*, 870 F.2d at 1464.

propriety in having circuit judges from the same geographic location as the judge on trial presiding over the case.[158] This is notable because although many circuit judges recused themselves from hearing Claiborne's pretrial motion, the majority of them subsequently concluded that it was proper for them to vote on the en banc question. Judge Reinhardt, Circuit Judge for the Ninth Circuit Court of Appeals, aptly recognized that "there can be no distinction drawn between the propriety of a judge's voting on a call for a hearing en banc and the propriety of a judge's hearing the appeal itself."[159] Further, Judge Reinhardt notes the immense discretion afforded the Chief Justice of the United States in designating judges to preside in another circuit.[160] Judge Reinhardt suggests a "random selection system" to be established through procedures that are a matter of public record to remedy this problem;[161] however, this has not been implemented. Noting the significance of Judge Claiborne's documented assertion of selective prosecution and the hand-picked manner in which the judges for his case may have been selected, the threat to the integrity of federal judges is great. The lack of consistency coupled with the absence of an unbiased standard for selecting judges to preside over cases compel the conclusion that subjective justice is at work; such a conclusion undermines the public confidence that justice has been done.

Judge Hastings's legal challenges to the Judicial Council's authority also present a curious situation. Most of Hastings's cases resulted in the recusal of other Eleventh Circuit judges.[162] At first glance this seems adequate; however, upon closer examination it is apparent that this was insufficient. As noted above, the Chief Justice is authorized to choose the judges who will sit by designation. In the Hastings

158. *Claiborne*, 781 F.2d at 1331.

159. *Id.* at 1330.

160.

> Under 28 U.S.C. §§ 291, 292, the Chief Justice of the Supreme Court . . . may select any judge he wishes; there are no published guidelines or standards. Thus, when a certificate of necessity is issued in a specific case or proceeding, there will always be an appearance that the judges designated are being hand-picked to decide the controversy.

Id. at 1333.

161. *Id.* Judge Claiborne's challenge to the absence of a random selection process was rejected on appeal by Judge William A. Norris. *Claiborne*, 870 F.2d at 1465-67. Judge Norris declined to pass on the prudence or fairness of such a process. *Id.* at 1467.

162. *See In re* Grand Jury Proceedings, 841 F.2d 1048 (11th Cir. 1988) (before Merritt, Jones, and Guy, JJ., of the Sixth Circuit); *In re* Request for Access to Grand Jury Materials, 833 F.2d 1438, 1439 (11th Cir. 1987) (same panel); *In re* Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1491 & n.1 (11th Cir.) (before Campbell, C.J., of the First Circuit, Kearse, J., of the Second Circuit, and Pell, J., of the Seventh Circuit), *cert. denied*, 477 U.S. 904 (1986); *In re* Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1262, 1263 (11th Cir. 1984) (same panel).

cases, this was improper because the Chief Justice, in his capacity as Chair of the Judicial Conference, was a named defendant.[163] Although the name on the pleading is often of little significance to the merits of a case, in impeachment related proceedings, naming the Chief Justice as a defendant is more than a formality. The Chief Justice, as chair of the Judicial Conference, reviews and considers the entire record from the judicial council in impeachment cases. Moreover, the Chief Justice, as chair of the Judicial Conference, is authorized to conduct additional investigations into the conduct of the accused judge. Therefore, the Chief Justice is intimately involved in the litigation. In its quest to guarantee a healthy, viable judiciary, this system instead leads the public to question the fairness of the judicial process as a whole. In such a climate as impeachment, the judicial involvement should appear to be as nonpartisan as possible. Instead, the current system taints the stature of the judiciary. The current process could be initiated by a judge with a conflict of interest, the decision may be denied judicial review, and the public will be denied access to the determinations of the judicial councils. Moreover, the judicial council has no established mechanism for addressing challenges to judicial impeachment investigations. While the costs of remedying these problems are low, the benefits are great. Public confidence in the federal judiciary should not be undervalued.

B. The Political Question Doctrine: Cognitive Selection as Jurisprudential Method

The judicial branch of government finds itself in a precarious position when placed in the midst of political disputes based on highly charged controversies. In many cases, the court has invoked the justiciability doctrines to avoid involvement in politics. One justiciability doctrine, the political question doctrine, embodies the concept that certain matters are inherently political in nature and are best resolved by the political branch of government and not by judicial review.[164]

163. *See supra* notes 85-87 and accompanying text; *see also Hastings I*, 593 F. Supp. at 1376.

164. NOWAK & ROTUNDA, supra note 123, § 2.15; *See also supra* notes 107-117 and accompanying text. A rational basis for the political question doctrine has eluded scholars:

> [T]he definition of a political question can be expanded or contracted in accordion-like fashion to meet the exigencies of the times. A juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions.

John P. Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 762, 768 (1955).

For additional commentary regarding the political question doctrine, see ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 76 (1989) (noting that the Federalists and the Republicans agreed that the judicial function involved deciding questions of a "nonpolitical" nature); CHARLES GORDON POST, JR., THE SUPREME COURT

The difficulty with the political question doctrine lies in its absolute finality—a holding of nonjusticiability is absolute in its foreclosure of judicial scrutiny. Thus, reliance of a court on the political question doctrine to resolve a dispute renders the conduct at issue immune from scrutiny.[165]

Traditionally, the process of impeachment has been acknowledged as a political process.[166] However, the application of the political question doctrine to federal judicial impeachment procedures is curious given the vast involvement of the judiciary in earlier aspects of the impeachment process.

This issue was explored more broadly in the Supreme Court's treatment of the *Nixon* case.[167] In finding Senate impeachment procedures a nonjusticiable political question in the *Nixon* opinion, Chief Justice Rehnquist reasoned that the Constitution grants the sole authority to try impeachments to the Senate.[168] The Court explained that the word "sole" constituted a textually demonstrable commitment of trial procedures to a coordinate branch of government, the first element in finding a political question in *Baker v. Carr*.[169] Searching for the meaning of the term "sole" in the impeachment trial clause, Justice Rehnquist resorted to dictionary definitions.[170] However he ultimately relied on the "common sense meaning" of the word sole, finding that the Senate alone should determine an individual's impeachment fate.[171] Based on that definition, the Court found that

AND POLITICAL QUESTIONS 11-14 (1936) (noting the unsatisfactory explanations offered by the Supreme Court for the political question doctrine); PHILIPPA STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION 1 (1974) ("Justices of the Supreme Court and of lower courts . . . have floundered in the quagmire of definition [of political questions]."); Miller, *supra* note 119 (arguing that judicial recognition of the political nature of legislative rules should limit court interference unless a private litigant is involved); Gregory Frederick Van Tatenhove, Comment, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597 (1987-88) (contending that judicial review of rules of Congress should be exercised in only the most limited circumstances because of the "political tension" inherent in such involvement).

165. NOWAK & ROTUNDA, *supra* note 123, § 2.15.

166. *See* THE FEDERALIST No. 78 (Alexander Hamilton).

167. *Nixon*, 113 S. Ct. at 735. The Supreme Court has consistently denied certiorari in cases involving the constitutional parameters of judicial discipline and impeachment. The grant of certiorari in this case represents the first authoritative pronouncement regarding judicial discipline by the Supreme Court.

168. *Id.*

169. *Id.* at 735-36. *See also supra* note 110 (citing the standard for the political question doctrine announced in the seminal case Baker v. Carr, 369 U.S. 186, 217 (1962)).

170. The Supreme Court's use of static dictionary definitions to resolve disputes in interpretation is increasing. For a discussion of the Court's use of the dictionary in the Nixon case, see *The Supreme Court, 1992 Term, Leading Cases, Justiciability*, 107 HARV. L. REV. 144, 298-303 (1993).

171. *Nixon*, 113 S. Ct. at 735.

the Framer's use of the word sole in the impeachment trial clause was sufficient to foreclose judicial review of Senate procedures.[172]

Likewise, the Court found a lack of a judicially manageable standard of review, the second element required to find a political question. In defining the word "try," the Court again resorted to dictionary definitions, but concluded that the insufficient precision of the word "try" failed to provide the necessary manageable standards of review.[173]

The Court further based its finding of nonjusticiability on constitutional history, citing for support the statement that "the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments."[174] Lending credence to this historical approach, the Court noted that the Framers intended separate criminal and impeachment trials for accused officials.[175] The Court also based its decision on prudential considerations and the observation that "[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers."[176]

Finally, the majority distinguished *Powell v. McCormack*.[177] In *Powell* the Court found justiciable Adam Clayton Powell's request for review of the House of Representative's refusal to seat him. The *Powell* court separated Congress's nonjusticiable authority to determine a member's constitutional qualifications of age, residency, and length of citizenship, from its justiciable act to deny a member his seat on other grounds.[178] The *Nixon* Court distinguished *Powell* based on a separate constitutional clause controlling the qualifications Congress could consider and the lack of such a clause to shape impeachment procedures.[179] Justice Stevens concurred in the Court's judgment, based on

172. *Id.*

173. *Id.* at 736.

174. *Id.* at 738.

175. *See supra* Part I.

> Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision?

Nixon, 113 S. Ct. at 739 (quoting THE FEDERALIST No. 65 (Alexander Hamilton)).

176. *Id.* The Court also noted that petitioner's argument would "place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." *Id.*

177. 395 U.S. 486 (1969).

178. *Id.* at 549-50.

179. *Nixon*, 113 S. Ct. at 740. *See also* Victor Williams, *Unconstitutional Bills of Attainder or Valid Impeachment Convictions?: The Walter Nixon and Alcee Hastings Impeachment Cases*, 22 SW. U. L. REV. 1077, 1097-98 (1993). Williams argues that contrary to the Chief Justice's assertion that no parallel provision exists to circumscribe the Senate im-

his perception that the Framers' intent to assign impeachment to the legislature was sufficient evidence of nonjusticiability.[180] Justice Stevens found that the danger of deciding the impeachment by a completely arbitrary method was slight because the Senate recognized the importance of its duty under the Constitution's impeachment trial clause.[181]

Justice White, joined by Justice Blackmun, found the case to be justiciable and therefore concurred only in the judgment.[182] Justice White was extremely dissatisfied with the way the majority addressed the separation of powers issue.[183] For Justice White, judicial review was essential to ensure the fairness of the process.[184] Justice White found that the word "sole" was intended merely to distinguish between the House and the Senate, each of which has a singular power over the impeachment process. Justice White also found the term "try" sufficiently definable and concluded that the judiciary has the duty and province to determine the sufficiency of the Senate impeachment procedure.[185]

Although Justice Souter found the case nonjusticiable in his concurring opinion,[186] he left open the possibility of judicial review of Senate impeachment procedures when justified by egregious circumstances.[187] Souter reasoned that trial by committee in the Senate was not an occasion that demands an answer from the courts because the committee trial is sufficient to satisfy the mandate of the impeachment clause.[188]

---

peachment proceedings, the Bill of Attainder clause is such a provision. *Id.* Williams explains that the Constitution's Bill of Attainder clause (U.S. CONST. art. I, § 9, cl. 3) was designed to prevent legislative punishment without judicial trial. *Id.* at 1100. Therefore, Williams argues, the Senate use of a committee to take testimony in impeachment hearings and the ultimate removal vote by the full Senate are the equivalent of legislative punishment without judicial trial in violation of the restrictions of the Bill of Attainder Clause. *Id.* at 1101.

180. *Nixon*, 113 S. Ct. at 740 (Stevens, J., concurring).

181. *Id. But see* Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 MD. L. REV. 437, 456 (1993) (arguing that the Senate possibly could use constitutionally suspicious methods for impeachment trials with no repercussions).

182. *Nixon*, 113 S. Ct. at 742 (White, J., concurring in the judgment).

183. *Id.*

184. *Id. See also* Napoleon B. Williams, Jr., *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. REV. 512, 513 (1975) (describing the separation of powers problems inherent in the grant of the impeachment power).

185. *Nixon*, 113 S. Ct. at 747 (Souter, J., concurring in the judgment).

186. *Id.*

187. *Id.* at 748.

188. *Id.*

The independence of the federal judiciary is a value that both historic and modern social architects have endeavored to protect through the impeachment clauses of the Constitution and the Judicial Councils Act. The *Nixon* Court posed the questions of the validity of the impeachment procedures as if the Justices had had no role in the impeachment proceedings prior to the case being heard by the Supreme Court. Chief Justice Rehnquist recited history and tradition in the *Nixon* case to assert that the judiciary should not have any role in impeachments because that could eviscerate what is effectively the only check on the judiciary.[189] Chief Justice Rehnquist relied on the political question doctrine as a means of avoiding the more complex issue of judicial involvement at all stages of an inherently political process.[190] His failure to acknowledge the reality that judges are involved in the impeachment process damages the public's perception of the integrity of the judiciary.

The judiciary's ability to continue to shape public discourse lies firmly in its ability to maintain public trust. The judiciary has been described as the "least dangerous branch"[191] because its power is derived from public confidence in the judicial branch's integrity and in the maintenance of the sanctity of the judicial process. It is disingenuous to include judicial involvement in the initiation of impeachment proceedings, while disallowing judicial involvement or review of subsequent congressional proceedings, based on the theory that the judiciary was not intended to participate in impeachments. This inconsistency in the impeachment process, underscored by Chief Justice Rehnquist's opinion in *Nixon*, mandates that action be taken to protect the sanctity of the judicial branch.

189. *Id.*

190. *See also* James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645, 655-56 (1992) (noting the political question doctrine is expressed in ambiguous and conclusory terms).

191. THE FEDERALIST No. 78 (Alexander Hamilton); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1986). As the Supreme Court has stated, "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action." Mistretta v. United States, 488 U.S. 361, 407 (1989). *The Federalist* further supports this view with the notation that "[t]he Judiciary . . . has not influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgement . . . ." THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

V. Incorporating Procedural Safeguards into the Judicial Councils Act

Considering the manifest need to attack corruption at every level of government, the interest in judicial policing is great. However, the Judicial Councils Act sustains a procedure that fails to provide federal judges with the protections of due process. Because judicial self-policing is necessary to the administration of a growing court system, at the very least, procedural safeguards must be implemented to ensure due process for accused judges. This Note argues for the adoption of formal judicial review of the application of the Judicial Councils Act to an accused judge, the public availability of investigatory actions, and a formal procedure for addressing judicial conflicts of interest within the judicial policing mechanism.

Formal judicial review of the proceedings of the investigating committee and the judicial council as applied to a particular judge will protect the sanctity of the process. To ensure that the fact finding inherent in investigating committee actions is accurate and that judges are afforded the due process protections guaranteed to them under the Constitution, the safeguard of judicial review should be implemented. Finally, judicial review of the proceedings at this early stage in an impeachment inquiry is necessary precisely because the Supreme Court, speaking through Chief Justice Rehnquist, has stated it will not review the procedures of Congress.[192]

Public access to investigating committee actions will provide the public with the confidence so necessary to ensure that justice is being done. The inevitable tendency for the public to perceive that the judiciary is either protecting its own, or conversely is unfairly condemning a judge perceived to have brought the judiciary into disrepute, will be lessened through the dissemination of this information. The public will then understand the nature of the proceedings and will therefore have greater confidence in the sanctity of the process.

The Congress finally should directly address the judicial conflicts of interest problems that have plagued the impeachment cases. Because the Judicial Councils Act requires judges to investigate and discipline their colleagues, the provision of express procedures will likely increase the consistency with which judicial misconduct is addressed. This Note argues for the adoption of a random selection process for the replacement of judges recused or otherwise disqualified from a proceeding. Contrary to the perception that some judges may have more expertise in some cases than in others and should therefore be selected using that criterion, the federal judiciary is teeming with talented jurists, all of whom may adequately apply the precepts of law to

192. *Nixon*, 113 S. Ct. at 735.

the problems of a misconduct hearing. A random selection process will exploit this pool, in addition to shielding the judiciary from the public suspicion associated with the disjointed manner by which judges are currently selected to serve in the face of recusal.

All of these reforms will protect the judiciary from the threat to its character caused by the implementation of the current scheme of judicial self-policing. Judges should be afforded this protection so that the underlying goals of the Judicial Councils Act—maintaining the public confidence in the judiciary and promoting the effective administration of justice—will be achieved. This will prevent an accused judge—and the public—from operating within a sea of doubt and suspicion.

Conclusion

The impeachment process was initially a constitutional process designed to remove corrupt judges. With the implementation of the Judicial Councils Act, it has since become largely a statutory process. From the framing of the constitutional impeachment clauses to the statutory attempt to streamline the impeachment process through the Judicial Councils Act, it is clear that independence and accountability are the two issues central to the maintenance of judicial independence. In our haste for an expedient method of judicial discipline, we have instead created a method by which judges are denied due process, and the public is left to question whether justice is being done.

The modern impeachments of Judges Claiborne, Hastings, and Nixon illustrate the limitations of the current system. Under the Judicial Councils Act, accused judges are denied the essential check of judicial review of the Act as applied to them. Further, as the Supreme Court announced in the *Nixon* decision, the procedures of the Congress in performing its role in impeachment is likewise immune from judicial scrutiny, under the political question doctrine. It is precisely because of this denial of judicial review of the end of the process that resort to the courts should be allowed in the early stages of the process. Additionally, the investigating committees created by the circuit judicial councils under the Judicial Councils Act operate without informing the public of their fact-finding process and investigatory actions. The public, susceptible to the perception that the judiciary is either protecting its own or unfairly persecuting one who has allegedly brought the judiciary into disrepute, is left to question whether, in fact, justice is being done. An additional problem under the Act is that it does not provide a mechanism for the consistent resolution of judicial conflicts of interest. Because the judiciary is called upon not only to investigate accused judges, but also to rule on the constitutionality of the Act itself, conflicts necessarily arise. Judges from the ac-

cused judge's circuit, conscious of the need to preserve the sanctity of the process, recuse themselves from impeachment related cases. Nonetheless, the Act provides no method for their replacement.

This Note argues for judicial review of the Judicial Councils Act as applied to accused judges, in addition to increasing public scrutiny of investigatory committee actions and implementation of a random selection process to improve the ad hoc method of replacement currently in place. All of these changes will create a process upon which the judiciary—and the public—can depend.